

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-220860

DATE: March 10, 1986

MATTER OF: Major Stephen M. Hartnett, USMC, Retired

DIGEST:

The prohibition against an officer of the United States accepting emoluments, office, etc., from a foreign government without the consent of Congress in Article I, section 9, clause 8 of the U.S. Constitution, and 37 U.S.C. § 908, is applicable to a retired member of the U.S. Marine Corps, who, under an employment agreement with a domestic corporation, serves as an instructor for, and is subject to the supervision and control of the Royal Saudi Navy, which is the source of the funds for his salary and other emoluments. Since he has not received the required congressional consent, his military retired pay must be withheld.

The question presented in this case is whether a retired military officer employed under an agreement with a Delaware corporation to be a Marine Corps Seamanship Instructor for the Royal Saudi Naval Forces of Saudi Arabia must receive the required approvals under 37 U.S.C. § 908 or continue to have his military retired pay suspended because of the constitutional provision prohibiting officers of the United States from receiving offices, emoluments, etc., from foreign governments without congressional consent.^{1/} Since under the terms of his employment agreement the officer performs work as an instructor for the Royal Saudi Naval Forces which supervises and controls him, and which is the source of the salary and other emoluments he receives, we conclude that without the statutory approvals of the employment the retired pay must be withheld.

^{1/} This decision is issued in response to a request from Lieutenant Colonel M. K. Chetkovich, USMC, Marine Corps Finance Center. The matter was forwarded to us after the Department of Defense Military Pay and Allowance Committee had assigned it control number DO-MC-1457.

-034769/129277

BACKGROUND

Major Stephen M. Hartnett, USMC, Retired, filed with the Marine Corps a DD Form 1357, "Statement of Employment," in May 1985 in which he states that he is employed by Frank E. Basil, Inc. (Basil), Washington, D.C., in the position of "Marine Corps Seamanship Instructor, Royal Saudi Naval Forces, Jeddah, Saudi Arabia." Additionally, Major Hartnett supplied a copy of his employment agreement in which he agreed to work for Basil, a corporation incorporated in Delaware, for 24 months commencing on May 25, 1985, or when he arrived in Saudi Arabia, whichever was later.

Of importance to this case are several sections of the employment agreement. The most important, section 4, provides that:

"Section 4 - ASSIGNMENT OF WORK

"(a) The Employee will be assigned during the Term of Employment to the performance of work for SIBC-BASIL, a joint venture of the Company and Saudi International Business Centre, a Saudi Arabian company. While so assigned the Employee will work under the direction and control of SIBC-BASIL personnel and, as and when directed to do so, under the direction and control of personnel of the Royal Saudi Naval Forces (hereinafter called the RSNF), subject to the provisions of paragraph (b) of Section 14.^{2/}

"(b) Although the Employee will normally be assigned work in his Job Classification, it is understood that if, in the sole opinion of the Company or SIBC-BASIL or the RSNF, the nature or volume of the work or the aptitudes of the Employee make it desirable to do so, the Company or SIBC-BASIL or the

^{2/} Paragraph (b) of Section 14 provides that the employee will follow the provisions of any applicable U.S. Government approved security manual insofar as U.S. classified information, materials or equipment is concerned.

RSNF may reassign the Employee from time to time to one or more other job classification. * * * (Emphases and footnote added.)

Another section of import is "Section 16 - termination," under which, among other things, Basil will terminate Major Hartnett's employment if directed to do so by the Saudi Arabian Government. Additionally under "Section 6 - Training" and "Section 8 - Hours of Work, Overtime and Holidays," the Royal Saudi Naval Forces respectively may direct the employee to train certain personnel in the work of his job classification and may schedule overtime for him.

In view of the above, the Marine Corps found that it appeared that Major Hartnett effectively was an employee of the Saudi Arabian Government since it could control and direct him. Consequently, the Marine Corps suspended payment of Major Hartnett's retired pay and advised him to request approval of his employment under 37 U.S.C. § 908, the statute granting conditional congressional consent for retired members to accept civil employment with a foreign government without loss of their retired pay.

Major Hartnett declined to seek approval of his employment, asserting instead that he is not employed by a foreign government. In support of his position he furnished a statement from the Acting Manager, Personnel and Administration, Saudi International Business Centre, stating in part:

"This is to certify that Stephen M. Hartnett is employed by Frank E. Basil, Inc. of Delaware, United States of America. He receives life support services from the Jeddah Site of SIBC-BASIL, a Joint Venture Project of the Saudi International Business Centre and Frank E. Basil, Inc. of Delaware, U.S.A.^{3/} All pay and benefits are received from Frank E. Basil, Inc. of Delaware, U.S.A.

^{3/} Presumably the "life support services" referred to are medical services, insurance, housing and meals referred to in Sections 12 and 13 of the Employment Agreement.

"In no way is Mr. Hartnett employed by either a Saudi controlled company or an Agency of the Government of Saudi Arabia."

The Disbursing Officer forwarded the matter to us for decision indicating that there is some doubt in the matter since it appears that both Basil and the Saudi Navy have power to direct and control Major Hartnett's employment. Pending our decision, Major Hartnett's retired pay remains suspended and an indebtedness has been established for him for compensation he earned between May 25 and August 31, 1985. The Disbursing Officer also asks whether, if it is determined that Major Hartnett's employment violates the constitutional provision, the value of the transportation and other relocation expenses furnished him under the employment agreement also should be considered emoluments received from a foreign government.

ANALYSIS

Article I, section 9, clause 8 of the Constitution of the United States prohibits any person "holding any Office of Profit or Trust" under the United States from accepting any present, emolument, office or title, "of any kind whatever," from a foreign government without the consent of Congress. Because retired members of the uniformed services retain their status as members of their service, this constitutional prohibition consistently has been interpreted to apply to them. They are subject to the withholding of their retired pay in an amount equal to the emoluments received from a foreign government (or instrumentality thereof) without the consent of Congress. See e.g., 58 Comp. Gen. 487 (1979); 53 Comp. Gen. 753 (1974). Therefore, it is clear that if Major Hartnett were employed directly by the Royal Saudi Naval Forces, his employment would be subject to this constitutional prohibition.

Accordingly, our inquiry is whether Major Hartnett's employment is with Basil, not the Royal Saudi Navy, so as to make the constitutional provision inapplicable to him.

In a somewhat similar case, a retired officer was employed and paid by a domestic corporation which then assigned him to work for Israeli Aircraft Industries, an instrumentality of the Government of Israel. It was shown

that the domestic corporation was in effect merely an employment agency and that actually there existed an employee-employer relationship between the officer and an instrumentality of a foreign government for which the domestic corporation procured personnel. We, therefore, looked through the ostensible relationship with the domestic corporation and held that the officer was actually working for Israeli Aircraft Industries, an instrumentality of the Government of Israel. 53 Comp. Gen. 753 (1974).

In that case we focused on the nature of the relationship between the retired member and Israeli Aircraft Industries. We applied well-established rules to determine whether there was an employee-employer relationship between the member and that organization focusing on several aspects including, particularly, who had the authority to hire, fire, and control the conduct of the employee. Indeed, we recognized that the critical aspect to establish the relationship of employee-employer was the right of the employer to exercise supervision and control, not the means used or the actual exercise thereof. See 53 Comp. Gen. at 756-757. See also B-165378, October 25, 1968.

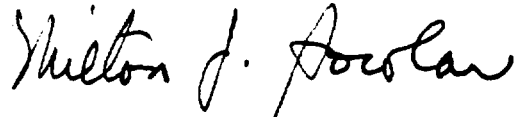
In this case also, while we have no specific information showing that Basil is merely an employment agency, there is sufficient evidence to conclude that Major Hartnett is in actuality an employee of the Royal Saudi Naval Forces since this entity may control and supervise him as well as terminate his employment. Also, although Major Hartnett does not receive his salary directly from the Saudi Arabian Government, the Saudi Arabian Government is apparently the source of the funds Basil uses to pay Major Hartnett and to provide the "life support" services to him. Therefore, he is in violation of Article I, section 9, clause 8 of the Constitution so as to require withholding of his retired pay. See B-217096, March 11, 1985.

Having determined that Major Hartnett's employment is in violation of the constitutional provision, we must now answer the question whether the transportation and other relocation expenses furnished him under his employment agreement are to be considered emoluments received from a foreign government. The constitutional provision does not merely preclude the acceptance of compensation but any presents, emoluments, office or title, "of any

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kind whatever" from a foreign state. We, therefore, have concluded that this provision requires the broadest possible scope and application, and have held that the transportation and payment of other expenses, such as received by Major Hartnett, are presents or emoluments received from a foreign government. See 58 Comp. Gen. 487, 493 (1979). Accordingly, assuming that the costs of these benefits furnished Major Hartnett are ultimately being borne by the Saudi government, similarly to his salary, they too are considered emoluments received from a foreign government.

Congress has given its consent to retired members of the uniformed services accepting civil employment by foreign governments and compensation for that employment provided that the retired members receive the approval of both the Secretary of State and the Secretary of the service concerned. See 37 U.S.C. § 908. Therefore, as the Marine Corps advised him, Major Hartnett should seek the required approval if he wishes to have payment of his retired pay resumed.



Acting Comptroller General
of the United States